VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 82-33
NANCY ALLEN	)	

FINDINGS OF FACT, OPINION AND ORDER

On May 26, 1982, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Nancy Allen ("Grievant"), contending Grievant received an anniversary increase of a lesser amount than she was entitled.

On November 9, 1982, the parties stipulated to the facts and admission of exhibits, and submitted the matter to the Labor Relations Board for decision without a hearing.

On November 9, 1982, VSEA filed a Memorandum of Law. The State filed a Memorandum of Law on November 17, 1982.

FINDINGS OF FACT

1. Since December 12, 1966, Grievant has continuously been an "employee", as that term is used in the Agreement between the State of Vermont and the VSEA, effective for the period July 1, 1981 to June 30, 1982 ("Contract"), and in 3 VSA §902(5). As such employee, Grievant has been, and is, entitled to all rights afforded to such employees by statute, by the Rules and Regulations for Personnel Administration, and by the Contract.

2. At all times relevant herein, Grievant's position title was Public Health Nurse, her pay grade was 13, and her work place was the Newport District Office, Department of Health.

3. During Grievant's employment by the State, her status as full-time versus part-time has changed, as follows:

a) December 12, 1966: Grievant was hired as a full-time employee in a Public Health Nurse Trainee position;

b) June 2, 1969: Grievant was promoted to her present position class (Public Health Nurse) and remained a full-time employee;

c) October 31, 1977: Grievant changed from a full-time to a part-time employee;

d) March 13, 1978: Grievant changed from a part-time to a full-time employee;

e) April 23, 1979: Grievant changed from a full-time to a part-time employee.

4. Article 35, Section 4 of the Contract provides:

> State Employees covered by this Agreement, who during this Agreement (7/81 - 6/82) reach or exceed the following anniversary numbers and whose most recent official performance evaluation was marked "3" (consistently meets job requirements/standards) or better, shall receive a base weekly pay rate adjustment beginning with the first full pay period following the anniversary date of most recent date of hire, reflecting the following increases in their annualized salaries based on the appropriate anniversary number, not to exceed the maximum in their pay scale.

	ANNIVERSARY NUMBER	ANNUALIZED INCREASE
...	11 and above	250.00

5. The collective bargaining agreements preceding and after the Contract here contain no provision identical or similar to Article 35, Section 4.

6. December 12, 1981, marked the 15th anniversary of the date of Grievant's hire.

7. Grievant's last annual performance rating prior to December 12, 1981, had been an overall "4" (Frequently exceeds job requirements/ standards), and she was, therefore, entitled to an anniversary increase pursuant to Article 35, Section 4, of the Contract.

8. Grievant's present work schedule varies from week to week. She works, on the average, slightly more than half-time. For the period June 20, 1981 through October 9, 1982, Grievant's hours averaged slightly more than 23 hours per week.

9. In general, the State implemented Article 35, Section 4, of the Contract by adjusting the hourly base rate of pay of all eligible employees. Adjustment to hourly base rates of pay of full-time employees, with the exception of State Police Unit members, was calculated as follows:

a) The hours worked in a year were calculated by multiplying 40 hours per week by 52 weeks in a year, which yielded a total of 2,080 hours per year;

b) Next, the appropriate annualized increase was found by reference to Article 35, Section 4, of the Contract;

c) The appropriate annualized increase was then divided by 2080 which yielded an hourly adjustment which would equal the contractual annualized increase.

10. The calculation of the adjustment for a full-time employee who had reached his/her 15th anniversary of continuous State service was as follows:

> The contractual annualized increase ($250.00) was divided by 2,080 (number of hours worked in a year) to arrive at an adjustment of $.12 per hour, which was added to the employee's base hourly rate of pay. Thus, an employee who worked 2,080 hours in a year would receive a $250.00 supplement to his annualized salary.

11. On December 20, 1981 Grievant received an anniversary increase of $.12 per hour. Grievant's increase was calculated as follows:

> The contractual annualized increase ($250.00) was divided by 2,080 to arrive at an adjustment of $.12 per hour, which was added to her base hourly rate of pay.

12. There are approximately 250 State employees who are in a permanent classified part-time status.

13. There are significant numbers of permanent part-time State employees who do not work on a regular schedule. Such irregularities in their schedules are attributable to job site workload requirements.

14. The Guidelines for Implementation of FY82 Economic Increases for Classified and State Employees, which was negotiated by the State and VSEA, provides:

> Every permanent-status...employee covered by these Agreements who, during the period July 1, 1981 through June 30 1982, reaches or exceeds the contracted anniversary number and whose most recent official performance evaluation was a "3", or better, shall receive the contracted base pay rate adjustment beginning with the first full pay period following the anniversary date of most recent date of hire. ...The anniversary increase expressed as an hourly rate of pay will be added to the employee's base hourly rate (except all overtime guarantees or increments, or other compensation) in effect on the last day of the pay period during which the appropriate anniversary falls...

15. Section 6.043 of the Rules and Regulations for Personnel Administration provides:

> All rates in the scales of pay are those authorized for full-time employment. Payment for part-time service shall be prorated at the rate for full-time service.

OPINION

The sole issue in this matter is whether the State has violated Article 35, Section 4, of the Contract in its method of calculating the annualized pay increase due Grievant as a result of her having reached the 15th anniversary of the date of her hire by the State.

Grievant was given a $.12 per hour anniversary increase. This was the same increase per hour given full-time employees with 11 and above years of service working a 40-hour week. This meant that over the course of the year, full-time employees would get a $250.00 increase, while Grievant, working an average of 23 hours per week, would get something less. The issue is whether Grievant was treated in conformity with the contract, or whether the State short-changed her.

The State defends their action on the grounds that the dollar amount provided in the Contract is no more than an approximation of what a full-time employee should receive, and part-time employees were treated fairly because by receiving a pro-rated increase, they received the same increase in hourly wage as everyone else. This pro-rated approach is fair, the State further argues, because many other benefits of part-time employment are also prorated. Further, the argument goes, the intent of the contract language, in part, was to reward longevity of service and a part-time employee does not invest as much time and commitment to his/her job as full-time employees. The State also defends the across-the-board hourly increase for all employees, whether part-time or full-time, on the grounds that it was simpler, less costly, and fairer than other methods of implementation.

In interpreting contract language, we are guided by the contract construction rules established by our Supreme Court. Parties are bound by the common meaning of their words where the language is clear, and extrinsic evidence under such circumstances is inadmissable as it could alter the understanding of the parties embodied in the language they chose to best express their intent. Hackel v. Vermont State Colleges, 140 Vt. 446 (1981). We will not read terms into a contract, unless they arise by necessary implication. In re Stacy, 138 Vt. 68 (1980).

In applying these rules to the instant case, we believe the State's interpretation of the contract language is erroneous. Article 35, Section 4, provides "employees covered by this Agreement...shall receive a base weekly pay rate adjustment...reflecting the following increases in their annualized salaries based on the appropriate anniversary number..." Employees whose anniversary number is "11 and above" are entitled to an annualized increase of $250.00. It is undisputed Grievant is an "employee covered by this Agreement", and during the term of the Agreement reached the 15th anniversary of the date of her hire. As such, she is clearly entitled to an annualized increase of $250.00.

Contrary to the State's argument, the clear contract language makes no distinction between full-time and part-time employees. Given such clear language, we will not look to extrinsic evidence to ascertain what the parties "intended" the language to mean. Hackel, supra.

The State relies on other contract provisions to support its pro-rated approach to Grievant's anniversary increase. Specifically, the State cites Article 26(2)(e), which provides a "part-time classified employee earns (annual) leave on a pro-rated basis", and Article 27(2)(a)(ii

which states, "a permanent part-time classified employee earns (sick) leave on a prorated basis". That these provisions require pro-ration does not mean the parties required pro-ration of anniversary increases for part-time employees. Instead, the fact that they did not expressly provide for pro-ration of anniversary increases while they did expressly require pro-ration for part-timers in other provisions of the Contract indicates pro-ration of anniversary increases was not intended. If it was, it could have been expressly required as it was in other Contract provisions.

The State also relies on Section 6.043 of the Rules and Regulations for Personnel Administration, to support its pro-rated approach. In re Grievance of Muzzy, ___ Vt. ___ (July 15, 1982), the Supreme Court cast substantial doubt on whether the State may legally rely on its Personnel Rules, which were unilaterally promulgated. We think the Court's analysis inapplicable here. In our experience, the Personnel Rules have been uniformly recognized as applicable by the parties unless explicitly altered by contract provisions. As such, they are an established past practice. We have recognized that day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are long-standing and not at variance with contract provisions. Grievance of Beyor, 5 VLRB 222 (1982).

Our view that the contractual relationship between the parties in labor relations normally consists of more than the specific contract provisions and encompasses existing practices is consistent with the common body of labor law. As expressed by the US Supreme Court in United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 US 574 (1960), there are "too many people, too many problems, too many

unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties."

We recognize Rules and Regulations for Personnel Administration are bargainable, 3 VSA §904(9), and here the parties have not explicitly bargained the established Personnel Rules. However, where, as here, the parties have bargained with the knowledge the Personnel Rules are applicable, the Personnel Rules are a past practice implicitly embedded in the Contract unless explicitly altered by the Contract.

In any event, Section 6.043 of the Personnel Rules does not support the State's prorated approach to anniversary increases. Section 6.043 provides all rates in the scales of pay are those authorized for full-time employment, and payment for part-time service shall be pro-rated. We believe the Contract makes this section obsolete. Rates in the scales of pay are expressed as hourly rates (Article 35, Section 1), and it is obvious the parties did not intend that hourly rates be lower because a person works part-time. It is apparent Section 6.043 was written when rates in the scales of pay were set as weekly rates, and applicable as long as they were expressed that way. The 1979-81 collective bargaining agreement between the State and VSEA was the last contract to set the rates in the scales of pay as weekly rates. Article XXXIV, Salaries/Wages. With the Contract change to hourly rates, in the 1981-82 Contract, Section 6.043 became meaningless, and provides no guidance here.

Finally, the State defends its anniversary increase to Grievant on the grounds that it was simpler, less costly, and fairer to grant her, as a part-time employee, the same hourly increase as full-time employees. We appreciate the difficulties of translating the annual increase due

Grievant into an hourly pay rate (as provided by the Implementation Guidelines) given the fact that Grievant is a part-time employee who works irregular hours. However, it is clear the Contract requires Grievant to receive a $250.00 annual increase. In negotiating that language, the State is required to abide by it; even though the method of implementation may be costlier, more time consuming, and more complex than a straight across-the-board hourly increase. While we will not order the State to use a particular method of implementation, we suggest the State base the hourly rate on a 23-hour work week; the average worked by Grievant for the period June 20, 1981 through October 9, 1982.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Grievance of Nancy Allen is ALLOWED; and

2. Grievant is entitled, effective December 20, 1981, to an annualized salary increase of $250.00 pursuant to Article 35, Section 4, of the July 1, 1981 - June 30, 1982 Agreement between the State of Vermont and the Vermont State Employees' Association. Grievant shall be paid the difference between the annualized salary increase she did receive and the annualized increase she should have received. The parties shall, within 10 days of the date of this Order, attempt to determine the monies owed Grievant and submit a stipulation to the Board indicating monies owed her. Such stipulation will be incorporated into a final order of the Board. Failing agreement on the amount of monies due Grievant, a hearing will be scheduled before the Board.

Dated this 30th day of December, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson

VERMONT LABOR RELATIONS BOARD

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NANCY ALLEN	)	

ORDER

Based on the findings of fact and for the reasons given in the December 30, 1982, Findings of Fact, Opinion and Order, and based on a January 13, 1983, stipulation of the parties as to the monies owed Grievant, it is hereby ORDERED:

1. The Grievance of Nancy Allen is ALLOWED, and

2. Grievant is entitled, effective December 20, 1981, to an annualized salary increase of $250.00, pursuant to Article 35, Section 4, of the July 1, 1981 - June 30, 1982, Agreement between the State of Vermont and the Vermont State Employees' Association. Grievant shall be paid $116.37, which is the difference between the annualized salary increase she did receive and the annualized salary increase she should have received for the period December 20, 1981 - December 19, 1982. In addition, Grievant shall receive an 8 cent per hour increase in her hourly rate of pay, effective December 20, 1982.

Dated this 7th day of January, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William C. Kemsley, Sr.

James S. Gilson